CHUAN SENG & ANOR A

v.

WAN ABDUL HAMID WAN JAAFAR & ORS

HIGH COURT MALAYA, ALOR SETAR B
SEE MEE CHUN JC
[WRIT OF SUMMONS NO: 22-244-2006]
14 SEPTEMBER 2010

LAND LAW: *Transfer - Validity of - Whether transfer of Malay Reserved land from second plaintiff to fourth defendant was procured fraudulently so as to render subsequent transfer to first defendant defeasible - Whether transfer contravened s. 6(1) Kedah Malay Reservation Enactment No. 63 - Whether first defendant a purchaser in good faith for valuable consideration - Kedah Malay Reservation Enactment No. 63, ss. 2, 6(1), 19* C D

LAND LAW: *Malay reservations - Dealings in reservation land - Whether transfer of Malay Reserved land from second plaintiff to fourth defendant was procured fraudulently so as to render subsequent transfer to first defendant defeasible - Whether transfer contravened s. 6(1) Kedah Malay Reservation Enactment No. 63 - Whether first defendant a purchaser in good faith for valuable consideration - Kedah Malay Reservation Enactment No. 63, ss. 2, 6(1), 19* E

LAND LAW: *Malay reservations - Dealings in reservation land - Creation of a trust deed in favour of a non-Malay - Whether terms of trust deed conferring right or interest upon non-Malay contravened s. 6(1) Kedah Malay Reservation Enactment No. 63 - Whether trust deed void* F

TRUSTS: *Land - Malay reservations, dealings in - Creation of a trust deed in favour of a non-Malay - Whether terms of trust deed conferring right or interest upon non-Malay contravened s. 6(1) Kedah Malay Reservation Enactment No. 63 - Whether trust deed void* G

The main issue in this case was whether the transfer of Malay Reserved land ('Lot 1349') from the second plaintiff, Abdullah, to the fourth defendant, Puja Development Sdn Bhd ('Puja'), was procured fraudulently so as to render the subsequent transfer to the first defendant defeasible. Abdullah and the second defendant, Wan Jaafar, had signed the respective Form 14A to transfer Lot 1349 and another lot to Puja on the same day. The purported consideration H I

of RM15,000 for the transfer of Lot 1349 was paid by Wan Jaafar to Abdullah. Abdullah, however, denied receiving any money and averred that he had signed the Form14A as instructed with no explanation given. Abdullah had purchased Lot 1349 with money borrowed from Saw, a partner in the first plaintiff, and they had both entered into a trust deed where Abdullah was to hold Lot 1349 in trust for Saw. Both plaintiffs filed their respective claims, whereas the first and fourth defendants counterclaimed for vacant possession, arrears of rent and damages.

Held (dismissing the first plaintiff's claim; allowing the second plaintiff's claim; dismissing the first and fourth defendants' counterclaim):

(1) Wan Jaafar exercised total control over Puja insofar as the use of money was concerned, which meant that Puja could be used as a vehicle to facilitate the fraud on Abdullah. Wan Jaafar had been a businessman since 1984 and owned many other companies besides Puja. He was mentally sharp and alert. This was in contrast to Abdullah who appeared to be a simpleton. He was also illiterate which made him susceptible to fraud. All the circumstances of this case led to the conclusion that there was a high degree of probability that the transfer of Lot 1349 from Abdullah to Puja was done fraudulently. The designed object was to cheat Abdullah of an existing right, which would be regarded as fraudulent. The evidence also indicated that no consideration of RM15,000 was paid to Abdullah; there was only a promise that he would be made a shareholder in Puja. (paras 5-10)

(2) The transfer of Lot 1349 (being Malay Reserved land) to Puja was *void ab initio* for having contravened s. 6(1) of the Kedah Malay Reservation Enactment No. 63 ('Enactment'). Puja was neither a Malay as defined in s. 2 of the Enactment nor had it been declared as one under s. 19. The fact that it was 100% owned by Malays did not make it a Malay within the meaning of the Enactment. There is no equivalent provision as that found in the Malay Reservation Enactment (FMS Cap 142) ('MRE') where a company with all-Malay members is deemed to be Malay. It is the Enactment which applies to Malay Reserved land in Kedah and not the MRE. *Hj Ahmad Ariffin & Anor v. Ahmad Mahmud* (foll). (para 11)

(3) Since Lot 1349 was acquired fraudulently and/or the transfer was *void ab initio*, the subsequent transfer by Puja to the first defendant could be set aside unless the first defendant was a purchaser in good faith for valuable consideration. However, the facts and circumstances of the case indicated that he was not such a purchaser. (paras 13-15)

(4) In respect of the trust deed between Abdullah and Saw, the Enactment does not have a similar provision to s. 14 of the MRE where there is an express restriction on the creation of a trust in favour or to the benefit of a non-Malay. However, the terms of the trust deed conferred a right or an interest upon Saw, which contravened s. 16 of the Enactment. Thus, the trust deed was void and the first plaintiff had no *locus standi* to bring this claim. (paras 17-18)

(5) Since the second plaintiff succeeded in his claim that the first defendant was not the proprietor of Lot 1349, the first and fourth defendants' counterclaim must necessarily fail. (para 19)

Case(s) referred to:

Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA ***(refd)***

Chu Choon Moi v. Nga Sew Tin [1985] 1 LNS 134 FC ***(refd)***

Hj Ahmad Ariffin & Anor v. Ahmad Mahmud [1976] 1 LNS 36 FC ***(foll)***

PJTV Denson (M) Sdn Bhd v. Roxy (Malaysia) Sdn Bhd [1980] 1 LNS 55 FC ***(refd)***

Legislation referred to:

Kedah Malay Reservation Enactment No 63, ss. 2, 6(1), 19

Malay Reservation Enactment (FMS Cap. 142) s. 14

National Land Code, s. 340(2), (3)

For the plaintiff - YK Loo; M/s YK Loo & Cheng

For the defendant - Ahmad Effande; M/s AR Effande & Partners

Reported by Suresh Nathan

JUDGMENT

See Mee Chun JC:

[1] The main issue is whether the transfer of Lot 1349 from the second plaintiff to fourth defendant was procured fraudulently such that the subsequent transfer to first defendant is rendered defeasible.

A **Fraud**

[2] The particulars of fraud are as set out in p. 6-7 of the amended statement of claim.

B **[3]** The law on fraud is clear. *PJTV Denson (M) Sdn Bhd v. Roxy (Malaysia) Sdn Bhd* [1980] 1 LNS 55; [1980] 2 MLJ 136 states at p. 138 that:

> Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only
C illustrative of fraud. Fraud must mean "actual fraud, ie dishonesty of some sort" for which the registered proprietor is a party or privy. … Thus … it was said that "if the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent …".

D **[4]** On degree of proof the then Supreme Court case of *Chu Choon Moi v. Nga Sew Tin* [1985] 1 LNS 134; [1986]1 MLJ 34 at p. 38 stated as follows:

> We agree that fraud whether made in civil or criminal proceedings must be proved beyond reasonable doubt and cannot be based on
E suspicion and conjecture. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The degree of proof need not reach certainty but it must carry a high degree of probability. What it means is that the evidence adduced is such that the Court or a prudent man considers its existence probable in the circumstances of the case.

F **[5]** What is the evidence adduced on fraud?

(a) Both second plaintiff (Abdullah) and second defendant (Wan Jaafar) had signed the respective Form 14A to transfer Lot 1349 and Lot 2806 to fourth defendant (Puja Sdn Bhd) on the same
G day ie, 25 March 1991. This was to convince Abdullah that Wan Jaafar had also transferred his land to Puja.

(b) The purported consideration of RM15,000 for the transfer of Lot 1349 was paid by Wan Jaafar to Abdullah. That being so,
H the transfer ought to have been effected in Wan Jaafar's name. That it was not is consistent with the promise that Abdullah would be made a shareholder in Puja and in exchange he was to transfer land to Puja along with Wan Jaafar.

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(c) The appointment of Abdullah as a director in Puja on 28 March 1990, before the transfer of Lot 1349 to Puja would again be consistent with the promise to him that he would be made a shareholder although it did not turn out to be so. Otherwise there would be no need for Abdullah to be appointed as a director more so when he is illiterate. Wan Jaafar had tried to say he was not a director and that there was never any connection between Puja and Abdullah; he merely sold land to Puja.

(d) After the transfer of Lot 2806 from Wan Jaafar to Puja, it was transferred back to Wan Jaafar on 4 August 1992. The question arises as to the need to transfer back and forth. That this was done could be due to the fact that the first transfer had served its purpose of convincing Abdullah that both were to transfer their land to Puja.

(e) The subsequent transfer of Lot 2806 from Wan Jaafar to a third party on 19 November 1194 and his insistence that this involved a different land from that transferred to Puja. Paragraph 10 of the agreed issues states that GM1424 Lot 2806 was transferred from Wan Jaafar to Puja; then back to Wan Jaafar and subsequently to the third party. In his evidence Wan Jaafar claimed that one involved GM579 and the other GM1424. It is in fact in the statement of defence at para. 17 that GM1424 was previously GM579. This was in order to evade the issue that he had transferred his land to Puja to convince Abdullah to do likewise and subsequently contrary to his promise the land was reverted to him.

(f) Total control exercised by Wan Jaafar over Puja insofar as the use of money is concerned where whatever money required by Puja would be paid by Wan Jaafar. Conversely money intended for Puja would be paid to Wan Jaafar. This meant that Puja could be used as the vehicle to facilitate the fraud on Abdullah.

(g) Personalities of Wan Jaafar and Abdullah are such that Wan Jaafar is in control of the situation. Wan Jaafar has been a businessman since 1984 and owned many companies other than Puja. He is mentally sharp and alert. This is in contrast to Abdullah who with due respect appears to be a simpleton. He is also illiterate which made him susceptible to fraud.

[6] All these circumstances lead the court to conclude that there was a high degree of probability that the transfer of Lot 1349 from Abdullah to Puja was done fraudulently. The designed object was to cheat Abdullah of an existing right and that is regarded as fraudulent.

[7] As against these is the consideration of RM15,000 paid to Abdullah. The fact of payment is reflected in Form 14A thumb printed by Abdullah. Abdullah in evidence denied receipt of any money. He signed Form 14A as instructed and no explanation was given. It was Wan Jaafar who brought the form to him. He thought the form "untuk masuk Puja".

[8] The Land Administrator (Mohd Asri Redha) who witnessed the attestation gave evidence he asked Abdullah whether he received payment to which Abdullah said he had. Mohd Asri also said it was the procedure for him to ensure payment had been settled before he signed Form 14A. Under re examination Mohd Asri agreed it was not necessary to ask about payment as it was clearly stated that consideration had been accepted.

[9] In cross examination Mohd Asri agreed his responsibility was only to witness the thumb print and to confirm the items in (i) to (iv) namely of full age, citizenship, consent and understanding of contents.

[10] In the light of the circumstances enumerated above on the transfer of Lot 1349, the evidence of Abdullah is preferred. This is especially so when Mohd Asri at first said he had asked about payment and then said it was not necessary to ask. No consideration of RM15,000 was paid to Abdullah, only the promise that he would be made a shareholder in Puja. Estoppel by deed does not apply as submitted by defendants counsel does not apply it not pleaded.

Whether Transfer Void

[11] The transfer of Lot 1349 (being Malay Reserved land) to Puja is void *ab initio* for having contravened s. 6(1) of the Kedah Reservations Enactment No. 63. Puja is not a Malay defined in s. 2 of the Enactment and neither has it been declared as one under s. 19. The fact of it being 100% owned by Malays does not make it a Malay within the meaning of the Enactment. There is no equivalent provision as that found in Malay Reservations Enactment

(FMS Cap 142) where a company with all members being Malay is deemed Malay. It is Enactment No. 63 which applies to Malay Reserved land in Kedah and not FMS Cap 142 as submitted by defendants' counsel.

[12] The Federal Court case of *Haji Ahmad bin Ariffin & Anor v. Ahmad bin Mahmud* [1976] 1 LNS 36; [1976] 2 MLJ 79 is clear authority that a transfer to a non Malay of Malay Reservation land which purports to vest in the non Malay a right is void *ab initio*. In considering the Kedah Malay Reservations Enactment the court said at p. 80 that:

> … if he sold his land to a non Malay and executed an agreement purporting to vest it in a non Malay, then clearly that agreement being 'contrary to the provisions of subsection (1) of section 6' is void. This is explicitly provided for by subsection (2) of section 6. … That subsection in my opinion is decisive and renders the purported sale void *ab initio*. It cannot be enforced by the purchaser. Nor can the purported purchaser pass a good title to another, even be he a Malay: *nemo dat quod non habet.*

Whether First Defendant *Bona Fide* Purchaser

[13] As Lot 1349 was acquired fraudulently and/or the transfer was void *ab initio*, the subsequent transfer by Puja to the first defendant on 21 March 2005 can be set aside unless the first defendant was a purchaser in good faith for valuable consideration – s. 340(2) and (3) of National Land Code 1965. Since the first defendant is relying on being a *bona fide* purchaser the evidential burden falls on him.

[14] The first defendant's evidence is that he paid RM70,000,00 in cash to Wan Jaafar before the transfer. Wan Jaafar said he received the cash for himself. On the face of it this appears in order. In the Court of Appeal case of *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526 at p. 553 it was said:

> An existence of a sale and purchase agreement and the payment of the purchase price in full cannot be the only indicator to show whether a person is a *bona fide* purchaser or otherwise. Other salient features surrounding the sale and purchase agreement must be considered.

[15] What then are the other salient features surrounding the transfer which this court can avail itself to? They are as follows:

A (a) The total control exerted by Wan Jaafar on Puja rendering it the vehicle for the fraud committed on Abdullah and now the vehicle to dispose of the land to his son.

(b) The purchase price being paid to Wan Jaafar when it ought to
B be paid to Puja and Wan Jaafar confirming he had received it *albeit* for himself.

(c) That the transaction was done in cash between son (first defendant) and father (Wan Jaafar) making it possible that no money ever changed hands.
C

(d) Puja's members resolution dated 1 December 2004 requiring the company seal to be affixed onto the instrument of transfer in the presence of two company directors was not complied with. There was no company seal and it was signed by one director
D and one shareholder.

These then are the circumstances which lead me to say first defendant was not a purchaser in good faith for valuable consideration.

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Trust Deed

[16] Abdullah had purchased Lot 1349 on money borrowed from Saw Kok Oon (Saw), a partner in first plaintiff. They both entered into a trust deed dated 21 August 1989 where Abdullah was to hold
F Lot 1349 in trust for Saw. It was agreed that Abdullah will at the request and cost of Saw convey and assign the land to such person at such time and in such manner or otherwise deal with the same as Saw shall direct and appoint.

G **[17]** Defendants' counsel submitted that the trust deed was void as it contravened s. 14 of FMS Cap 142. As stated earlier the law applicable in Kedah is Enactment No. 63. Enactment No. 63 does not have a similar provision to s. 14 of FMS Cap 142 where there is an express restriction on the creation of a trust in favour or to
H the benefit of a non Malay.

[18] However the terms of the trust deed confer a right or interest to Saw such that it contravenes s. 6(1) of Enactment No. 63 and is void. The first plaintiff has no *locus standi* to bring this claim.

I

Counterclaim

[19] The first and fourth defendants have counterclaimed for vacant possession, arrears of rent and damages for loss and exclusive use. It follows that since the second plaintiff has succeeded in his claim that the first defendant is not the proprietor of Lot 1349 that the counterclaim must necessarily fail.

Conclusion

[20] For all the above reasons first plaintiff claim is dismissed; second plaintiff claim is allowed and defendants counterclaim is dismissed. Costs to second plaintiff.